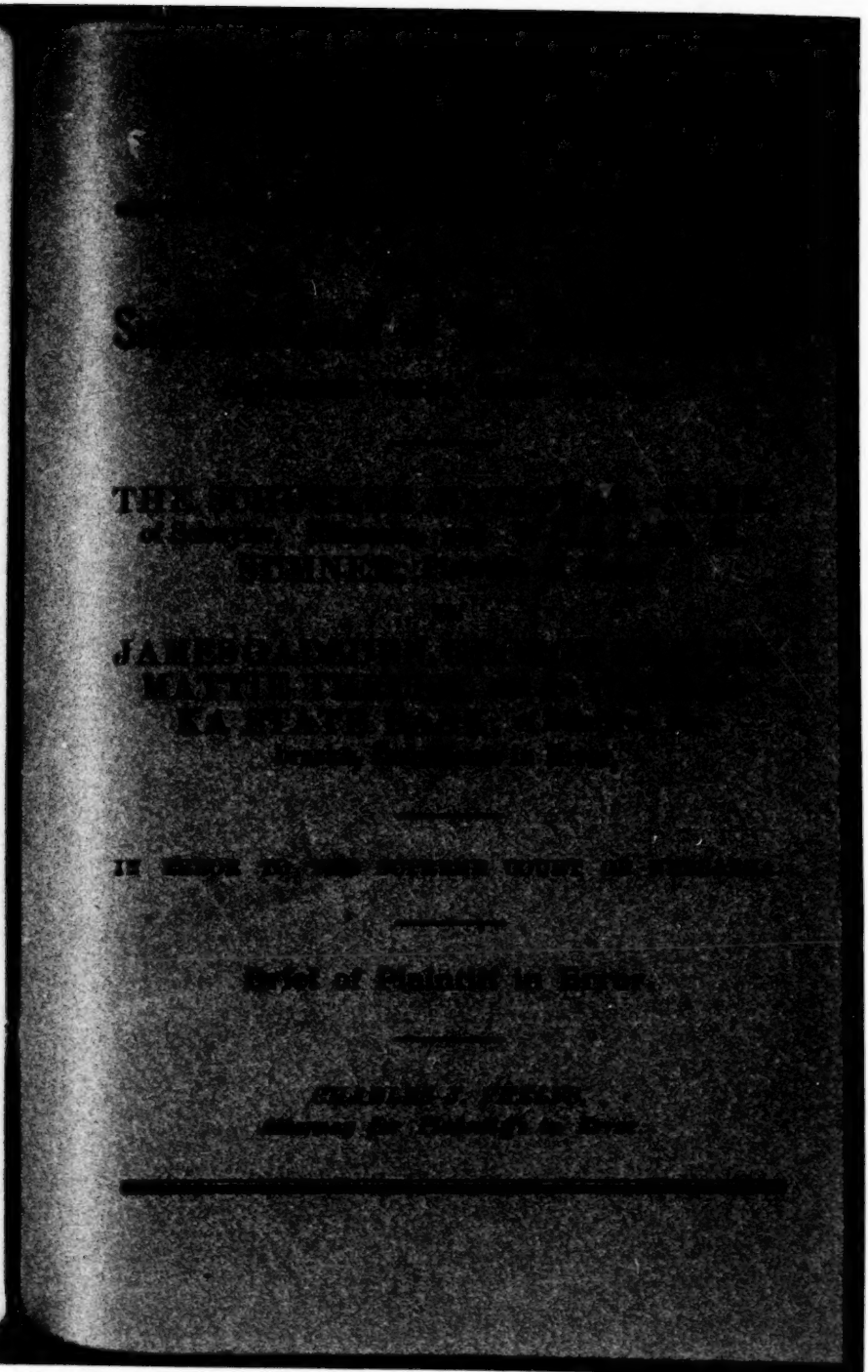

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1903. NO. 219. 570.

THE SCHUYLER NATIONAL BANK, of Schuyler, Nebraska, and WILLIAM H. SUMNER, Plaintiffs in Error,

vs.

JAMES GADSDEN, GEORGE THRUSH, MATTIE THRUSH, and the NEBRASKA STATE BANK, of Schuyler, Nebraska, Defendants in Error.

IN ERROR TO THE STPREME COURT OF NEBRASKA.

Brief of Plaintiff in Error.

The facts disclosed by the record involved in this suit, as between the plaintiffs in error and the defendant Thrush, are: that on the 8th day of August, 1890, Thrush had been a customer of the bank from a time anterior to the 24th day of July, 1889; had borrowed various sums of money at the

bank at different times; renewing his note therefor from time to time, and on the 8th day of August, 1890, was indebted to the bank in the sum of $1436.55, and on that day, to secure the same and the further sum of $3334.45, in all the sum of $4771.00, he, together with his wife, the defendant Mattie Thrush, executed and delivered to the bank his note for $5,000, and to further secure the same made and delivered their promissory note to William H. Sumner, who was and is the president of the bank, and a mortgage on the real estate involved in this action, which said last note and mortgage are referred to in the pleadings and evidence as collateral to secure the debt due the bank. These were held as securities for all the moneys loaned by the bank to Thrush. On some of these loans a rate exceeding the legal rate, ten per cent per annum, was charged by the bank and at the time the $5,000 note and mortgage were executed, interest to the amount of $229, in advance for six months, was computed at a rate exceeding the legal rate and this sum, $229, has been carried in the notes computed in making up the sum of $3229, claimed in plaintiff's cross bill and for which the trial court entered a decree, less the sum of $229. But all interest charged at a usurious rate and paid by Thrush, was charged, paid and received more than two years before the bringing of this action. These items of usurious interest paid to the bank, were, by the trial judge, disregarded, because of that fact appearing in the bank and Sumner's plea, as also in the evidence.

The suit was originally brought by Gadsden, and Sumner was made a defendant. He in his answer and cross bill, [record page 11]sets up the transaction showing the Schuyler National bank to be the real party in interest, and on its application, Sumner uniting, the Schuyler National Bank was made a party in conjunction with Sumner, [see record pages 42, 43 and 44], and bring the case into this court by appeal.

Defendant Thrush and his wife each filed answer to Sumner's cross bill, identical in matter [record pages 14 and 25] setting up the borrowing of the money by Thrush from the bank , and alleging the payments of interest and the rates charged.

To these answers each specifying and setting out in twenty-one numbered paragraphs the times when and the amounts which it is alleged George Thrush paid excessive charges, reply is made by the bank and Sumner, denying some of the allegations, and setting up the bar of the statute of limitations, as to each item, and alleging that the court has no jurisdiction in this action. The plaintiffs claim that in a suit brought expressly by one having paid usurious interest to a national bank, only, can the statutory penalty be recovered, and that such payments made, as in this case is claimed, cannot be the basis of counter claim or set-off. [See record pages 36 and 39].

The court in its findings and decree [see 2nd ¶ of de-

cree, record page 49 and 50] found that there was included in the claim of the bank for $3229.00, $229 usurious interest contracted for and included in the $5,000 note and executed on the 8th day of August, 1890, and this was deducted from the amount claimed, but upon every other fact pleaded and claims made by the bank, the court's finding was for the bank.

That the mortgage and note made to Wm. H. Sumner was to secure a debt due the bank for moneys wholly furnished by the bank and entitling the bank to a lien upon the premises described in the mortgage, fully appears from the undisputed evidence of the cashier, J. S. Johnson, and the admission of the defendant, George Thrush.

That the the items of interest set out in the answer filed to the cross petition of the defendants Wm. H. Sumner and the Schuyler National bank and charged as paid by said George Thrush, were, as alleged in the replies thereto, transactions occurring more than two years before the commencement of this suit, clearly appears.

That as to the allegations of the excessive interest made in paragraphs 21, 22, 23 and 24, of defendants George and Mattie Thrush's answer, and denied in the replies of William H. Sumner and the Schuyler National Bank, the proof fully sustains the finding and decree.

The ffnding that the interest contracted for on August

8th, 1890, to the amount of $229, carried as unpaid interest contracted for in the note of $3229, is a finding taken with the entire finding and decree, in effect for the bank upon every other issue between the bank and Thrush. That the transactions involved are to be dealt with under the laws of congress and not by the law of the state, need not be argued, it is clearly apparent notwithstanding the ingenious contention of opposing counsel, to sustain which the testimony of Thrush and Johnson would all have to be disregarded.

The decision of the Supreme Court of Nebraska imposes the penalty prescribed by the Nebraska statute, [record page 117]. In the opinion Irvine C. [record page 118], the court makes the following brief summary of the facts:

> "Thrush was largely indebted to that bank. He obtained a further loan and executed to the bank a note for five thousand dollars to represent the consolidated indebtedness. At the same time there was made a note for a like amount to William H. Sumner and a mortgage to Sumner to secure the latter note. Sumner was an officer of the bank. He had no individual dealings with Thrush, and the sole purpose of the note and mortgage to him was to secure the debt due the bank. Certain payments were paid on the bank's note, so that when it came to foreclosure the bank claimed as due only $3229.

To the cross petition of Sumner, in which the bank was permitted to join, Thrush pleaded usury. It was clearly shown that the transactions between Thrush and the bank were tainted with usury, and the court so found. But the view was taken that, as the transaction was in effect with a national bank, the remedies afforded by the act of Congress were exclusive, and that Thrush was not entitled to the benefit of the state laws whereby he might set off against the principal all payments made of interest. Accordingly there was allowed this bank its principal."

In the motion for a rehearing [record page 122] and finally [record page 113], the federal question is more especially and specifically set up, and the claim that a right secured by a law of Congress denied is most urgently presented to the Supreme Court of Nebraska.

There was no decision in the trial court against the plaintiffs in error, It is the decision of the Supreme Court of Nebraska that plaintiffs complain of, and as in duty bound plaintiffs in their motion for rehearing allege:

"Now comes William H. Sumner, for and on behalf of the Schuyler National Bank, of Schuyler, Nebraska, and the said Schuyler National Bank, of Schuyler, Nebraska, defendants herein, and move the

court for a rehearing of said cause and, for grounds of their motion, say:

First: That said Schuyler National Bank is an Association incorporated under the laws of the Congress of the United States, relating to national banks.

Second: That by the decision of this court the said Schuyler National Bank has been denied a right secured to it by the laws of the United States, relating to national banks, in this, to-wit. That in said decision the provisions of the law of the state of Nebraska, relating to interest and providing a penalty for usury, have been declared against said Schuyler National Bank and embodied in said decision. That said decision is erroneous because the penalties provided in sections 5197 and 5198 of the Revised Statutes of the United States are exclusive, and they only can be enforced against said Schuyler National Bank, because it is fully shown in the pleading, proof and record that the transaction in the suit between said Schuyler National Bank and the defendant, George Thrush, arises solely from moneys loaned on its own account by said Schuyler National Bank to said George Thrush, and interest paid thereon by said George Thrush to said Schuyler National Bank, between whom the decision complained of was made.

Third: The defendant, George Thrush, in his answer to the Schuyler National Bank's cross petition, fully acknowledges the transaction involved to be a *loaning of money* by said bank to him, and sets out the items of interest by him paid, always to the said Schuyler National Bank, acknowledging that the note and mortgage to William H. Sumner were collateral to the debt due the said bank, but in his prayers for relief, asks to have the amounts of interest so paid deducted from the principal sum loaned, which this court by its decision complained of, orders done, which denies said Schuyler National Bank its rights secured by the laws of Congress relating to national banks, imposing upon said National Bank the penalties of the usury laws of the state of Nebraska, which do not apply to national banks and ought not to be imposed in this suit between the said Schuyler National Bank and the said George Thrush.

This cause comes, finally, on error from a decision of the Supreme Court of Nebraska, reaffirming its decision directing the trial court to compute the amount due the plainliff in error in accord with the opinion of the state Supreme court.

The late decision affirming the trial court's decision, finding the amount due plaintiff in accord with the former opinion, and is final in every respect as affecting the question

of the jurisdiction of this court.

Plaintiff's brief was prepared when it brought the case here upon the sormer decision of the state court and is practically unchanged; the issues have not been in any wise changed. The plaintiff's motion for rehearing in the former trial and in the final hearing being identical and the final decision being in accord with the former opinion and after the findings made in compliance therewith by the trial court.

The case was here upon the petition in error of plaintiff, argued, submitted and dismissed, for want of jurisdiction, because the former decision of the state court was not a final decision, at the October Term, 1900, of the Supreme Court of the United States. [179 U. S. 384].

The decree entered in the trial court on the 31st day of August, 1895, 2nd paragraph, [record page 49] is, plaintiffs contend, in accord with the law governing the rights of the parties.

This decision was reversed by the Supreme Court of Nebraska in a decision rendered on the 3rd day of November, 1898, [record page 117] coupled with the opinion of the court found at page 120 of the record.

This reversal remanded the case to the trial court, the mandate directing the trial court to compute the amount, [See record page 1]

Final decree in the trial court was entered on the 4th day of January, 1902. [See record page 3, paragraph 2 on page 4.]

The case was then appealed to the Supreme Court of Nebraska, and on the 19th day of February, 1902, decided [record page 112] with the opinion of that court. [See record page 111.]

Plaintiff's motion for rehearing, identical with its former motion, discussed in the following brief is found at record page 113.

Plaintiff's assignment of error, identical with the former assignment of error, is found at record page 140.

The sole contention to sustain the judgment of the Supreme Court of Nebraska, in reversing the finding and judgment of the trial judge, is that the transaction should be regarded as one between Sumner and Thrush, in disregard of the rights of the bank as a national bank, protected by the laws of Congress governing national banks and prescribing all the penalties that may be imposed upon a national bank, and imposing the penalty prescribed by the statutes of Nebraska, which the Supreme Court of Nebraska did. See decision (record page 117, affirmed in final judgment, record page 112) and the opinion touching this plaintiff's rights (record pages 111 and 112.)

The Nebraska Statute provides: (Chapter 44, title interest.)

Section 1. (Rate.)— Any rate of iterest which may be agreed upon, not exceeding ten dollars per year upon one hundred dollars shall be valid upon any loan or forbearance of money, goods, or things in action; which rate of interest may be taken yearly or for any shorter period, or in advance if so expressly agreed.

Section 5. (Usury—Consequences—Agents)—If a greater rate of interest than is hereinbefore allowed shall be contracted for or received, or reserved, the contract shall not, therefore, be void; but if in any action on such contract, proof be made that illegal interest has been directly or indirectly contracted for or taken, or reserved, the plaintiff shall only recover the principal, without interest, and the defendant shall recover the costs; and if interest shall have been paid thereon, judgment shall be for the principal, deducting interest paid; provided, the acts and dealings of an agent shall bind the principal, and in all cases where there is illegal interest by the transaction of the agent, the principal will be held thereby as if he had done the same in person. Where the same person acts as agent for the borrowers who obtains the money from the lender, he shall be deemed to be the agent of the loaner also.

SPECIFICATION OF ERRORS RELIED UPON.

First: That by the decision of the Supreme court of Nebraska the said Schuyler National Bank, an association incorporated under the laws of the Congress relating to national banks, has been denied a right secured to it by the laws of the United States relating to national banks, in this, to-wit: That in said decision the provisions of the law of the state of Nebraska relating to interest and providing a penalty for usury have been declared against said Schuyler National bank and embodied in said decision.

Commissioner Irvine's statement in the opinion of the court above set forth, the pleadings in the trial court, and the decision itself unmistakably support the allegations of this error.

Second: That said decision is erroneous because the penalties provided in sections 5197 and 5198 of the revised Statutes of the United States are exclusive, and they only can be enforced against said Schuyler National bank, because it is fully shown in the pleadings, proof and record that the transaction in suit between said Schuyler National Bank and the defendant, George Thrush, arose solely from moneys loaned on its own account by said Schuyler National Bank to said George Thrush and interest paid thereon by said George Thrush to said Schuyler National Bank, between whom the decision complained of was made.

That the transactions involved were those where the Schuyler National Bank loaned its money directly to Defendant Thrush and received interest and payments thereon directly from him, is fully agreed to by the parties, witnesses and the finding of the trial court, concurred in by the opinion of the State Supreme Court.

Third: The defendant George Thrush, in his answer to the Schuyler National Bank's cross petition, (record pages 14 to 24 inclusive) fully acknowledges the transaction involved to be a loaning of money by said Schuyler National Bank to him, and sets out the items of interest by him paid, always to said Schuyler National Bank, acknowledging that the note and mortgage to said William H. Sumner were collateral to the debt due the said Schuyler National Bank; but in his prayer for relief asked to have the amounts of interest so paid deducted from the principal sum loaned, under the provisions of the law of Nebraska, which said supreme court of Nebraska, over-ruling the trial court, by its decision complained of ordered done, which decision denies said Schuyler National Bank its rights secured by the laws of Congress relating to National banks, imposing upon said Schuyler National Bank the penalties of the usury laws of Nebraska, which do not apply to national banks, and are erroneously imposed in this suit between said Schuyler National Bank and said George Thrush.

Fourth: The decision complained of is based upon the error of the court in assuming that the note and mortgage to Wil-

liam H. Sumner were made with intent to evade the inhibition against the taking by a national bank of real estate security for loans made at the time, whereas there is not the slightest evidenceto support such an inference, and the exact opposite fully appears in the record, and that it was not wholly for money loaned at the time, but prior thereto to a large amount.

Thrush's attorney called Johnson, the bank's cashier, to the witness stand, who, in answer to his direct questions, clearly shows that there was no such intent on the part of the bank. See record page 87 beginning with question No. 442.

Fifth: The court erred in assuming that the naming of William H. Sumner as mortgagee was done with intent to deceive or defraud said George Thrush, and there is no evidence to sustain such a finding.

Johnson testified (record page 59) that making the mortgage to Sumner was satisfactory to Thrush, and he is in no wise disputed in this. It was talked over and agreed to, as shown by the testimony of both the cashier and Thrush, before the notes and mortgage were given.

Sixth: The court erred in holding the Scl ler National Bank estopped, because there was no estoppel pleaded and there was no evidence whatever to support any ground or finding of estoppel.

We submit the following considerations:

That the Schuyler National Bank, one of the plaintiffs in error, is an association incorporated under the laws of the Congress of the United States relating to national banks, and doing business as such in all the transactions involved in this suit between it and the defendant, George Thrush, fully appears in the pleadings, proof and record herein. [See averment in cross petition and Johnson's evidence, record page 55, in answer to questions 1, 2, 3 and 4.]

That the principal contention, as between the defendant George Thrush and the Schuyler National Bank, is, and has been, as to whether the usury laws of the state of Nebraska should govern in determining the rights of the parties, the bank at all times contending that the laws of Congress relating to national banks, alone govern and determine its rights in this case. The court below sustained the bank's contention, but the Nebraska Supreme Court [record page 49, paragraph 2] reversed that decision and entered a decision imposing the penalties prescribed by the laws of the state of Nebraska.

The bank complains that the decision is against its rights, privileges and immunities secured by the laws of the United States relating to national banks.

That the penalties imposed by sections 5197 and 5198 of the Revised Statutes of the United States are the only penalties which can be imposed in this suit, seems established by

every decision since that made in the Supreme Court of the United States in 1875, in the case of the Farmers' and Merchants' Bank of Buffalo vs. Deering, 91 U. S. 196, in which it was held that "It must always be borne in mind that the Constitution of the United States and the laws which shall be made in pursuance therewith are the supreme law of the land, and this law here involved is as much a part of the law of each state, and as binding upon its authorities and people as its own local constitution and laws." And it was expressly held in that case that the law of the state did not apply, and upon that point the decision of the Court of Appeals of New York was reversed. That decision has been uniformly followed until the one we are engaged in was reached. The learned judge rendering the decision fell into the error of assuming that the collateral note and mortgage made to William H. Sumner—we call the paper collateral, Thrush in his answer calls it collateral—was made with intent "to evade the inhibition against the taking by a national bank of real estate security for loans made at the time." The proof is clear and full that no such intent or reason moved the bank. Johnson, the cashier of the bank, who personally attended to every item of the transaction between the bank and Thrush, in answer to the direct question by Thrush's attorney, "Wasn't this the reason that the bank did not have authority to take real estate security on loans?" answered, "No sir, we have authority to take real estate security on loans." [Record page 87,

answer to question 443.] And following along to and including question 447 he explains satisfactorily the reasons for taking collateral security in the name of William H. Sumner, and in none of his statements is the inference left which seems to have formed the basis of the decision complained of.

What if he did? Could that authorize a court to impose the penalties provided by the state laws, which have no force in the determination of the rights and liabilities of a national bank?

But Johnson was right in his answer. A national bank has the right to take real estate security for a debt past due. A large sum, a portion of the $5000, was past due; for that, at least, the bank had the right to receive a mortgage. That the money secured also, money that day loaned, even though prohibited, does not make the security less effective, nor take away the right of the bank to a decree of foreclosure.

In the State National Bank vs. Flathers, 45 La Ann 75, it was held that the objection that a national bank has loaned money on real estate in violation of the prohibition of the national banking laws does not lie in the mouth of the delinquent debtor of such loan and does not disable the bank from enforcing the mortgage. The United States alone can complain of such violation.

In Winton vs. Little, 94 Pa. St. 64, it was held that real estate security taken by a national bank for present or future

advances is valid.

In National Bank vs Whitney, 103 U. S. 99, it was held that where real estate security had been taken to secure a present or future loan, no one but the government can be heard to complain that the bank has exceeded its power.

The case of the Union National Bank of St. Louis vs Elizabeth Matthews, 98 U. S. 188, was the first case that reached the Supreme Court of the United States, presenting the question of the effect of a national bank taking real estate security on a loan when made, holding the mortgage security valid and enforceable, citing with approval Bank vs Haire, 36 Iowa, 443, where an arrangement for the benefit of the bank was through a third person quite as indirect as in this case.

Among the cases bearing upon the question involved are Swope vs Leffingwell, 105 U. S. 3; Reynolds vs National Bank, 112 U. S. 405; Fortier vs National Bank, 112 U. S. 439; Wheney vs Hale, 77 Mo. 20.

The collateral note and mortgage were made to secure the debt due from Thrush to the bank. It was not done with intent to in any way deceive or defraud Thrush, nor in any way did, or could it, affect his liability to the bank or the right of the bank to foreclose the mortgage. The debt is the basis of the oank's claim and rights, the mortgage is a mere incident of the debt and follows it, so, in substance, held

in Webb vs. Hoselton, 4 Neb. 318, and in perhaps a thousand other cases. The debt is, and at all times has been the property of the bank, so also the security.

The bank, as shown by the decision above cited, has a clear right to foreclose its mortgage. Having a right to foreclose, it must be treated, so far as this suit is concerned, as having a valid and in every respect a lawful note and mortgage. How, then, can the court apply a penalty provided by the laws of Nebraska, which cannot, at law or in equity, be imposed upon a national bank?

The decision complained of is supported in the opinion by the declaration that the bank took the name of William H. Sumner "to evade the inhibition against the taking by a national bank of real estate security for loans when made at the time." We have shown that the record does not support that view. But it is further said of the bank that "the object was to evade the burdens attaching to its position as a national bank," which we contend is not to be inferred from any evidence in the record. Upon this basis the decision declares "It would be highly unconscionable to permit a person to give a contract a false form to evade the burdens which would follow from i s true expression, and then permit him to show the truth as against the form to evade the burdens cast by a contract in the form which has been so chosen."

As between these parties no burden would fall upon the

bank had it been named in the mortgage as a mortgagee. In National Bank vs Whitney, 103 U. S. 99, the court, in speaking of the decision in National Bank vs Mathews, 99 U. S. 621, says:

"The construction of the act of Congress thus given has been acted upon by the National banks throughout the country since it was published. It is not unreasonable to suppose that they have conducted their business and made loans to a large amount in reliance upon it, and that in many cases great injury would follow a departure from it. Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubt as to their soundness. The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed. If there should be a change, the legislature can make it with infinitely less derangement of the interests of the country than would follow a new ruling of the court, for statutory regulations would operate only in the future.

"The decision in the case cited controls the present case, and in conformity with it, we must hold that the mortgage to the bank, so far as the subsequent incumbrances are concerned, is to be regarded

as a valid security for the future advances to the mortgagor. Whatever objection there may be to it as security for such advances from the prohibitory provisions of the statute, the objection can only be urged by the government.—Fleckner vs Bk. 8 Wheat 338 to 355.

With this in view it can hardly be urged that the bank was seeking to evade burdens. For twenty years national banks have been sustained in taking real estate security for such loans, and Mr. Johnson was right when he said it was not taken with any such intent as is imputed to the bank. But is the bank estopped from showing, as in fact it has shown, the true state of facts upon which it relies? Thrush was not deceived, nor was he in any way defrauded, nor was he induced to do any act or thing different because of the making of the collateral paper. There is no essential element of estoppel in the conduct of the transaction on the part of the bank. There was no false representation or concealment of material facts. Thrush was not ignorant of any fact inducing his execution of the contract or entering into the contract itself, nor was he induced to execute the contract by any mis-statement, deceit or fraud whatever. The record discloses just what the collateral note and mortgage were taken for, and the reasons. Thrush shows in his evidence that, while he knew every fact and circumstance, he does not recollect just what was said. In answer to his counsel's in-

quiry: "Was there anything said about what the note and mortgage to William H. Sumner was to be for?" he says (record page 68, questions 164 and 165) "To make it better security." And to his counsel's further query: "What was said about what Sumner was to do the mortgage?" he replied: "There was nothing said." On page 84 of the record, question 397, his counsel again asked him: "Was there anything said as to why this $5,000 note and mortgage was to be made to Mr. Sumner?" He said, "No, sir." "Did Mr. Johnson say anything on that branch?" He answered, "Said 'make it to him,'" meaning Sumner, "He said 'make it to William H. Sumner, not to the bank."

But counsel for Thrush, evidently not satisfied with his client's testimony, called Mr. Johnson to the stand, making him a witness for Thrush, who testified in answer to Mr. Dolezal's questions in reference to taking the collateral: (record page 87, questions 442 and 443, above referred to) "It was simply a habit that the Schuyler National Bank had of taking collateral in Mr. Sumner's name." And in answer to the question: "Wasn't this the reason, that the bank did not have authority to take real estate security on loans?" he said, as before stated, "No sir, we have authority to take real estate loans as security," and being further questioned by Dolezal, he said: "It was simply our habit, I can't see any good reason for it myself." And on record page 61, question 74 in answer to Dolezal's inquiry, Johnson testifies that the col-

lateral was taken "Because that was mutually agreed then to be left as security." It was left as collateral, and speaking of the collateral (record page 91, question 500) he said, "It is easier to handle, easier to release. He could release it quicker than the bank could; we would have to have a meeting, really, to release such things."

And on record page 92, question 516, answering Dolezal's question "Why was this note for $5,000 taken at all, exhibit No. 1?" he said: "It was done to secure the bank as collateral." Dolezal, still questioning him, asked [record page 93, question 528) "Did you have any authority to endorse this exhibit 1 in Mr. Sumner's name?" he answered: "Why, it didn't need any endorsement, it was left as collateral."

From the evidence it is submitted that no just inference can be drawn that the bank took the collateral note and mortgage to evade the provisions of the national banking laws. Certainly there is nowhere in the evidence any testimony whatever showing the elements constituting the basis of an estoppel against the bank.

It should be remembered that the defendant, Thrush, in his answer to the cross-petition of the Schuyler National bank, declares, and repeats again and again that declaration, that the note and mortgage to William H. Sumner, were collateral to, and made to secure the debt due to the bank. Before the note to the bank and the collateral note and mortgage in the

name of William H. Sumner, were made, executed and delivered, and before the additional sum of money was paid to Thrush, it was clearly agreed and understood between Johnson, the cashier, and Thrush, that the mortgage should be made in the name of William H. Sumner, the bank's president. And nowhere in said answer, or in any pleadings in the case, does he attempt to plead an estoppel against said Schuyler National Bank.

If an estoppel be relied upon as a defense to an action, it must be plead, or it will not avail the party.—B. & M. R. R. Co. vs Harris, 8 Nebraska 140.

If to either party is to be applied the doctrine of estoppel, surely it is not to the bank, but to Thrush, the obligor. The mortgage and note to Sumner is, by agreement of all parties, collateral to the debt due to the bank, which is evidenced by the note executed to the bank. Thrush is therefore estopped by the recital in the note to the bank from denying his indebtedness to the bank, and that the transaction is between the bank and himself.

If the contract were an illegal one, then possibly Thrush could plead an estoppel, and the bank be estopped from showing that the debt is due to it and not to Sumner; but the contract is not an illegal one, either under the laws of Nebraska or of Congress.

Certainly if the question of usury is open to investigation

in this suit, it is made so as between the bank and Thrush and carries with it every question of fact involved in the transaction. To say that the bank shall suffer a penalty under the law, and not be entitled to whatever benefits the law secures to it, is a proposition that will hardly stand scrutiny.

Certainly estoppel by conduct is not involved in the dealings between the bank and Thrush, for not one of the elements of estoppel enter into their dealings.

What constitutes the elements of such estoppel is stated in Bigelow on Estoppel, Fifth Edition, page 570:

1. "There must have been a false representation or a concealment of material facts.

2. "The representation must have been made with knowledge, actual or virtual, of the facts.

3. "The party to whom it was made must have been ignorant, actually and permissibly, of the truth of the matter.

4. "It must have been made with intention, actual or virtual, that the other party should act upon it.

(The conduct of the party to be estopped must be at least misleading.—Bigelow on Estoppel, page 669 and on page 670. Again on page 671: "The act or conduct of the party to be estopped must be such as would be apt to mislead a prudent man in a case where there is much risk.")

5. "The other party must have been induced to act upon it."

Under the rule announced by the Nebraska court in Nash vs Bakes, 58 N. W. 706, that "In order to constitute an equitable estoppel by silence or acquiescence it must be made to appear that the facts upon which it is sought to make the estoppel operate, were known to the party against whom the estoppel is urged, and unknown to the party urging it."

In the opinion we are complaining of, reference is made to the "terse headnote" to Hayes vs People, 25 N. Y. 390, illustrating, it is said, the principle which the learned commissioner regards as involved in this case. In that case concealment, deceit and fraud were practiced upon one of the parties to a contract of marriage, and the party guilty of the deceit and falsehood was, of course, estopped to deny that the contract was sufficient in law to sustain a conviction for bigamy. But suppose both, with full knowledge of all the facts, had conspired to go through the form of a marriage ceremony to deceive the neighbors, would it then have been bigamy, or simply a case of fornication and adultery? How that case can in any view, afford support to the conclusion that a party to a contract who conceals nothing, deceives nobody, and where every fact and circumstance is as well known to the party for whom the estoppel is urged as to the party is who to be estopped, is beyond our understanding of the law, and it is equally hard to understand what principle of law can be

invoked to estop the bank from relying upon the truth, which at all times has been as fully known by Thrush as by the bank's officer with whom he was dealing.

The transactions having all been between the bank and Thrush; and all founded upon loans by and for the bank to Thrush, and the mortgage made by agreement between the bank and Thrush to secure the debt to the bank, inures, as it was intended, to the benefit of the bank, and it could be enforced only by and for the benefit of the bank, governed by the law affecting the parties to the loan, Thrush and the Schuyler National Bank.

A recent decision of this court in the case of Seward A. Haseltine, et al vs the Central National Bank, 183 U. S. 118, holds: "Usurious interest paid in cash upon renewals of a note given to a national bank, and of all other notes of which it was a consolidation, cannot be set off in an action against the note, as the remedy provided by U. S. Rev. Stat. § 5198, when such usurious interest has been actually paid,—viz., a recovery in an action of twice the amount of interest thus paid, is exclusive."

For the reasons given, it is respectfully submitted that the judgment of the Supreme Court of Nebraska should be reversed and the judgment in the trial court be re-instated, with interest and the usual costs in the case.

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